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19 **UNITED STATES DISTRICT COURT**
20 **EASTERN DISTRICT OF WASHINGTON**

21 UNITED STATES OF AMERICA,

22 Plaintiff,

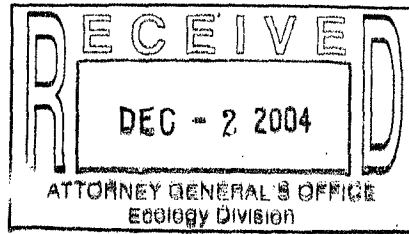
23 v.

24 LINDA HOFFMAN, in her official capacity as
25 Director of the Washington Department of
26 Ecology, the WASHINGTON DEPARTMENT
27 OF ECOLOGY, and the STATE OF
WASHINGTON,

Defendants.

28 The United States of America, on behalf of the United States Department of
29 Energy ("DOE"), alleges as follows:

30 COMPLAINT



FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DEC 01 2004

JAMES R. LARSEN, CLERK
DEPUTY
RICHLAND, WASHINGTON

No.

CV-04-5128-AAM

UNITED STATES'
COMPLAINT

U. S. DEPARTMENT OF JUSTICE
c/o NOAA/Damage Assessment
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Seattle, WA 98115-0070
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1 **NATURE OF THE ACTION**

2 1. This is a civil action for declaratory and injunctive relief by the
3 United States of America, on behalf of DOE, challenging Washington State
4 Initiative Measure No. 297 ("I-297" or "the Initiative"), a new state law that would
5 govern the treatment, storage and disposal of mixed radioactive and hazardous
6 waste at DOE's Hanford Nuclear Reservation ("Hanford"), near Richland,
7 Washington, and other federal facilities such those of the United States Navy in
8 Washington State.

9 2. I-297 was adopted by Washington State initiative vote on
10 November 2, 2004, and takes effect on December 2, 2004. The Initiative declares
11 that its purpose is to prevent facilities within Washington State "at which mixed
12 radioactive and hazardous wastes have contaminated or threaten to contaminate
13 the environment, such as the Hanford Nuclear Reservation, from adding more
14 waste that is not generated from the cleanup of the site until such waste on-site has
15 been cleaned up and is stored, treated, or disposed of in compliance with all state
16 and federal environment laws." I-297 § 1. The Initiative also contains numerous
17 provisions that would impose new requirements on the storage, treatment and
18 disposal of mixed waste already on-site at Hanford.

19 3. Although by its terms I-297 would apply to sites within Washington
20 State other than Hanford, it expressly refers to Hanford ten times, and declares that
21 "use of Hanford as a national waste dump for radioactive and/or hazardous or
22 toxic wastes will increase contamination and risks," and further states that
23 pollution from Hanford has "jeopardized" Washington residents' right to "a
24 healthy environment." I-297 § 2(1), (3).

25 4. The United States challenges I-297 on various grounds, including:
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1 (1) that it is contrary to the Atomic Energy Act ("AEA"), ch. 1073, 68 Stat. 919
2 (1954) (codified as amended at 42 U.S.C. §§ 2011 et seq. (1994 & Supp. III
3 1997)), and the Supremacy Clause of the United States Constitution, U.S. Const.
4 art. VI, cl. 2.; (2) that it regulates activities that are outside the waiver of sovereign
5 immunity in section 6001 of the Resource, Conservation and Recovery Act
6 ("RCRA"), 42 U.S.C. § 6961(a); and (3) that it is contrary to Article I, Section 8,
7 Clause 3 of the United States Constitution (the Commerce Clause), which reserves
8 to the federal government the power to regulate interstate commerce.

9 5. In this action, the United States seeks: (1) a declaration that I-297 is
10 invalid as applied to federal facilities in the State of Washington, including
11 Hanford; and (2) a preliminary and permanent injunction precluding Defendants
12 from taking any action against the federal government based upon I-297, and such
13 other relief as is just and appropriate.

14 JURISDICTION AND VENUE

15 6. This Court has jurisdiction over the subject matter of this action
16 pursuant to 28 U.S.C. §§ 1331 and 1345.

17 7. Venue is proper in the United States District Court for the Eastern
18 District of Washington pursuant to 28 U.S.C. § 1391(b) because Defendants
19 conduct business in this district, most of the claims in this civil action arose in this
20 district and much of the subject property is located in this district.

21 PARTIES

22 8. The Plaintiff in this action is the United States of America. The
23 United States, acting through DOE, is the owner of the Hanford Nuclear
24 Reservation, which is located near Richland, Washington, and is expressly
25 identified as subject to the provisions of the challenged I-297. The United States

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1 also owns facilities in Washington State operated by other federal agencies such as
2 the Puget Sound Naval Shipyard and Intermediate Maintenance Facility (PSNS &
3 IMF), that are also affected by the provisions of I-297.

4 9. Authority to bring this suit is vested in the United States Department
5 of Justice by 28 U.S.C. §§ 516 and 519.

6 10. Defendant Linda Hoffman is the Director of the Washington State
7 Department of Ecology, and is sued herein in her official capacity.

8 11. The Washington State Department of Ecology ("Ecology") is an
9 agency of the State of Washington. Ecology is the state agency that regulates
10 hazardous waste in the State of Washington under the Washington Hazardous
11 Waste Management Act ("HWMA"), Wash. Rev. Code 70.105.

12 12. The State of Washington is a State of the United States of America.

13 **STATUTORY AND REGULATORY BACKGROUND**

14 13. In the Atomic Energy Act of 1954 ("AEA"), ch. 1073, 68 Stat. 919
15 (codified as amended at 42 U.S.C. §§ 2011 *et seq.* (1994 & Supp. III 1997)),
16 Congress created a comprehensive program governing the production, use and
17 disposal of source, special nuclear and byproduct materials.

18 14. The AEA authorized the Atomic Energy Commission, a predecessor
19 agency to DOE, to establish rules, regulations, or orders to govern the possession
20 and use of source, special nuclear, and byproduct materials as it deemed necessary
21 or desirable to promote the common defense and security, to protect health and to
22 minimize danger to life or property. See 42 U.S.C. § 2201(i)(3).

23 15. These authorities of the Atomic Energy Commission were transferred
24 to DOE as one of the successor agencies to the Commission. 42 U.S.C. §§ 5814,
25 7101. Consistent with its AEA authority, DOE developed regulations and Orders,

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1 some of which directly address DOE's management of radioactive material and
2 radioactive waste. *See, e.g.*, 10 C.F.R. Parts 820 (Procedural Rules for DOE
3 Nuclear Activities), 830 (Nuclear Safety Management), and 835 (Occupational
4 Radiation Protection) (2001); Order 435.1, Change 1 (Radioactive Waste
5 Management) (Aug. 28, 2001); Order 5400.5, Change 2 (Radiation Protection of
6 the Public and the Environment) (Jan. 7, 1993); Order 5400.1, Change 1 (General
7 Environmental Protection Program) (June 21, 1990).

8 16. In addition, for Naval Nuclear Propulsion matters, the
9 regulatory authority of the AEA is vested in the Naval Nuclear Propulsion
10 Program (NNPP). The NNPP is a joint agency of the DOE and of the Navy and
11 was established pursuant to Executive Order 12344 and Public Law 98-525.

12 16. Under RCRA, the United States Environmental Protection Agency
13 ("EPA") may regulate the management of hazardous waste. A hazardous waste is
14 "a solid waste, or combination of solid wastes, which because of its quantity,
15 concentration, or physical, chemical, or infectious characteristics" may pose a
16 substantial present or potential hazard to human health or the environment if not
17 properly managed. 42 U.S.C. § 6903(5). "Solid waste," in turn, is defined under
18 RCRA, and that definition explicitly excludes "source, special nuclear, or
19 byproduct material as defined by the [AEA]." *Id.* § 6903(27).

20 17. RCRA defines "mixed waste" as waste that "contains both hazardous
21 waste and source, special nuclear, or by-product material subject to the Atomic
22 Energy Act of 1954[.]" 42 U.S.C. § 6903(41). Mixed waste under RCRA is
23 regulated under multiple authorities. *See* 66 Fed. Reg. 27,218, 27,221 (May 16,
24 2001). Pursuant to the AEA, DOE regulates the radioactive component of "mixed
25 waste." *See* 66 Fed. Reg. 27,218, 27,221 (May 16, 2001). Pursuant to RCRA,

1 EPA or authorized states regulate the "hazardous waste" component of "mixed
2 waste." See id.

3 18. Under section 3006 of RCRA, EPA may authorize states to
4 administer and enforce their own state hazardous waste program in lieu of the
5 federal program developed by EPA under Subchapter III of RCRA. 42 U.S.C.
6 § 6926.

7 19. Consistent with RCRA section 3006, EPA has authorized the State of
8 Washington to administer its own Hazardous Waste Management Act ("HWMA"),
9 RCW 70.105, and implementing regulations, and authorized the State to operate
10 its program in lieu of the federal program developed by EPA under Subchapter III
11 of RCRA. 51 Fed. Reg. 3782, January 31, 1986.

12 20. Permits are required under RCRA and the HWMA for any facility –
13 such as Hanford – that treats, stores, or disposes ("TSD") of hazardous wastes.
14 There are two types of HWMA/RCRA TSD permits: an interim (Part A) permit
15 and a final (Part B) permit. 40 C.F.R. Part 264-265. The permit, whether interim
16 or final, establishes how specific waste is to be managed by generators,
17 transporters and TSD facilities. Id.

18 21. Prior to receipt of a final permit, a facility can conduct hazardous
19 waste management and disposal operations consistent with federal and state law if
20 it has what is called interim status pursuant to a Part A permit. A facility can
21 obtain interim status if, inter alia, it was "in existence on the effective date of
22 statutory or regulatory changes . . . that render the facility subject to the
23 requirement to have a [RCRA] permit." Under RCRA, 42 U.S.C. § 6925(e), a
24 facility with interim status "shall be treated as having been issued [a] permit until
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1 such time as final administrative disposition of [the facility's permit] application is
2 made."

3 22. Section 1006(a) of RCRA further provides: "[n]othing in this chapter
4 shall be construed to apply to (or to authorize any State, interstate, or local
5 authority to regulate) any activity or substance which is subject to . . . the Atomic
6 Energy Act of 1954 except to the extent that such application (or regulation) is not
7 inconsistent with the requirements of such Act[.]" 42 U.S.C. § 6905(a).

8 23. Similarly, section 6001(a) of RCRA contains a limited waiver of the
9 United States' sovereign immunity as to the application of RCRA and state
10 hazardous waste laws such as the Washington Hazardous Waste Management
11 Act, Wash. Rev. Code 70.105, to federal facilities such as Hanford. 42 U.S.C. §
12 6961(a). The waiver extends only to requirements respecting control and
13 abatement of solid waste and disposal and management of hazardous waste, which
14 by definition do not include source, special nuclear, or byproduct material as
15 defined by the AEA. *See* 42 U.S.C. § 6903(27).

16 24. The Comprehensive Environmental Response, Compensation, and
17 Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9675, as amended by the
18 Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No.
19 99-499, 100 Stat. 1613 (Oct. 17, 1986), provides a comprehensive statutory
20 scheme for cleaning up releases or threatened releases of hazardous substances.
21 CERCLA authorizes EPA to issue to undertake actions and issue orders where
22 there is a release or a threat of release of hazardous substances. 42 U.S.C. §§
23 9604, 9606.

24 25. CERCLA section 120(e) directs that, for federal facilities listed on
25 EPA's National Priorities List, interagency agreements shall be entered into

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1 between EPA and federal agencies that own or operate facilities that require
2 remediation of hazardous substances. 42 U.S.C. § 120(e). Hazardous substances
3 addressed pursuant to CERCLA include radionuclides. 40 C.F.R. § 302.4.
4 Hanford is a federal facility listed on the NPL.

5 26. In 1989, DOE, Ecology, and EPA entered into the Hanford Federal
6 Facility Agreement and Consent Order ("HFFACO"). The HFFACO is the
7 primary agreement governing the cleanup of wastes, including radioactive wastes,
8 at the Hanford site. The parties to the HFFACO entered into that agreement
9 pursuant to their authorities under CERCLA, RCRA, and the Washington HWMA.
10 The HFFACO is an interagency agreement within the meaning of CERCLA
11 section 120(e), 42 U.S.C. § 120(e).

12 27. The HFFACO contains a substantial number of "milestone" series
13 which set deadlines for cleaning up the different wastes at the different facilities at
14 the Hanford Site. The HFFACO is a "comprehensive agreement" in which "the
15 parties [DOE, EPA and the State of Washington] intend to integrate DOE's
16 CERCLA response obligations and RCRA corrective action obligations"
17 HFFACO, as Amended 1998, Part One, Art. I, Sec. 17.

18 FACTS

19 28. I-297 expressly is directed at regulating mixed waste regarding
20 Hanford, and its provisions could well be read to apply to the other federal
21 facilities within the State, including facilities of the United States Navy.

22 **I. Hanford**

23 29. The United States, through DOE, owns the Hanford site -- a facility
24 comprising approximately 560 square miles near Richland, Washington.

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1 30. The United States acquired Hanford in 1943, and for almost 50 years
2 Hanford's facilities were dedicated to plutonium production for the nation's
3 nuclear arsenal. Hanford facilities were first built and run by the Army Corps of
4 Engineers, and have been operated by the Atomic Energy Commission and its
5 successor agencies. Since 1977 Hanford has been operated by DOE.

6 31. Radioactive wastes have been generated at Hanford since 1944 as
7 part of the national defense program. Since the 1960s, programs at Hanford have
8 diversified to include research and development for advanced reactors, renewable
9 energy technologies, waste disposal technologies. Facilities at Hanford,
10 particularly the Pacific Northwest National laboratories ("PNNL") continue to
11 perform research and other work critical to DOE's science and national security
12 mission. These activities include research, testing, and analysis related to
13 biomolecular science, microbiology and environmental sciences; monitoring
14 compliance with nuclear treaties and agreements, preventing proliferation of
15 weapons of mass destruction; and countering terrorism, including threats from
16 chemical and biological agents.

17 **Cleanup Operations At Hanford**

18 32. Currently, the majority of Energy's budget and efforts at Hanford are
19 devoted to cleanup, including monitoring and management of wastes to be
20 remediated, retrieval and processing of wastes, and permanent disposal of wastes.
21 These types of activities are carried out at several different facilities, which
22 contain many different types of waste, on the Hanford Site. All together, Energy
23 spends approximately \$2 billion annually on cleanup at Hanford. Energy's goal is
24 to complete all Hanford cleanup in 35 years.

25 33. In 1980, DOE submitted Part A of its RCRA permit application to
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1 EPA, qualifying for interim status pursuant to RCRA section 3005, allowing it to
2 conduct hazardous waste management and disposal operations consistent with
3 federal and state law.

4 34. Major facilities at Hanford historically used by DOE for weapons
5 production and/or waste disposal are subject to their own set of provisions under
6 the HFFACO, which sets milestones regarding the timing, manner, and/or criteria
7 for the cleanup of those facilities.

8 35. Cleanup activities at Hanford are conducted at numerous facilities,
9 some of which were used in weapons production, and others of which were
10 created specifically to store, process, or dispose of wastes. Some of the weapons
11 production facilities are also being used for purposes of the cleanup. The
12 following are examples of cleanup operations at Hanford.

13 (1) **Transuranic Waste Retrieval from the Low-Level Burial**
14 **Grounds.**

15 Approximately 80,000 55-gallon drum equivalents of transuranic and
16 suspect transuranic waste are stored at the Hanford Site. Much of this waste was
17 generated at Hanford as a result of nuclear weapons production and was
18 "retrievably stored" in trenches between 1970 and 1988 in an area known as the
19 "Low Level Burial Grounds" on Hanford's Central Plateau. This waste is
20 currently being retrieved from the Low-Level Burial Grounds. Upon retrieval, the
21 waste is characterized to determine whether it is "mixed waste" containing
22 hazardous waste subject to regulation under RCRA. Wastes determined to be
23 mixed are then stored in RCRA-permitted facilities such as the Central Waste
24 Complex. Non-mixed radioactive wastes are stored and processed in compliance
25 with DOE's orders and requirements implementing the AEA, but the facilities at

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1 which those activities take place are not necessarily RCRA/HWMA-permitted
2 facilities.

3 **(2) Removal of K Basin Sludge.**

4 The K Basins are in close proximity to the Columbia River and were used at
5 Hanford to store thousands of used fuel rods after they had been removed from
6 nuclear reactors. The K Basins were filled with water to prevent rapid oxidation
7 of the fuel rods and to prevent the escape of radiation. The fuel rods have now
8 been removed from the K Basins and placed in dry storage away from the
9 Columbia River.

10 A critical remaining task is the removal of highly radioactive sludge that has
11 accumulated at the bottom of the pools of water where the used fuel rods were
12 stored. The K Basin sludge is classified as non-mixed waste, and the cleanup plan
13 being implemented calls for removal of this waste to other facilities at Hanford.

14 **(3) Tank Farm Operations and Remediation.**

15 The Tank Farms store liquid and solid wastes in 177 underground
16 tanks: 149 single-shell tanks and 28 newer double-shell tanks. Declaration of
17 Delmar L. Noyes ("Noyes Decl.") ¶ 4 (filed December 1, 2004). The tanks contain
18 approximately 53 million gallons of waste. Id. Significant Hanford resources are
19 dedicated to the safe storage, retrieval, remediation, and ultimate treatment and
20 disposal of these wastes. Id. These activities include: maintaining safe storage of
21 the waste; transferring waste from older single-shell tanks to double-shell tanks;
22 closure of tanks; and design, construction and operations of treatment, storage and
23 disposal facilities. Id. Other activities related to the operation of the Tank Farms
24 include construction and operation of the Waste Treatment and Immobilization
25 Plant for separating and vitrifying the high-level and low activity waste from the

1 tanks for permanent disposal either on or off site and demonstration of the bulk
2 vitrification technology, both of which are underway. Id.

3 **(4) Plutonium Finishing Plant Demolition and Disposal.**

4 The demolition and disposal of the Plutonium Finishing Plant is currently
5 underway. This project has been identified by Energy as a high-priority project
6 because it addresses nuclear weapons grade plutonium and poses significant
7 environmental risk. The wastes generated by the demolition and disposal of this
8 facility include both mixed wastes and non-mixed wastes, and those waste streams
9 are managed separately.

10 **(5) Pacific Northwest National Laboratories ("PNNL").**

11 PNNL has several facilities both on and off the Hanford Site, which perform
12 a wide variety of research and development activities. A substantial portion of the
13 work in these facilities involve the use of radioactive materials, including projects
14 that support the Hanford cleanup. For example, PNNL analyzes samples taken
15 from the underground tank farms, conducts tests to demonstrate the feasibility of
16 bulk vitrification processes for certain tank wastes, and performs waste
17 characterization analysis for K Basin sludge and groundwater monitoring. Other
18 work performed by PNNL includes research using radioactive materials
19 supporting the Department of Homeland Security, nuclear non-proliferation,
20 biomass fuels, medical isotopes, and materials development. Most of these
21 research activities are not presently regulated under RCRA/HWMA treatment,
22 storage and disposal ("TSD") permits, but do comply with HWMA generator
23 requirements. PNNL and DOE are currently co-permittees on the Hanford Site
24 RCRA permit, and operate two TSDs.

25 **(6) Central Waste Complex.**

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1 The Central Waste Complex ("CWC") is the primary storage facility for
2 low-level and transuranic mixed wastes not contained in the tank farms at
3 Hanford. Mixed wastes are stored there until they are permanently disposed of (in
4 the case of mixed low-level wastes) or, in the case of transuranic wastes, until they
5 are certified for shipment to the Waste Isolation Pilot Plant, a geological
6 repository in New Mexico ("WIPP").

7 **Transfer of Radioactive Waste to Hanford:**

8 36. Radioactive waste shipped to Hanford has been the subject of
9 numerous environmental studies and DOE programmatic decisions. In May 1997,
10 DOE issued its complex-wide Final Waste Management Programmatic Impact
11 Statement (PEIS), evaluating alternatives for management of low-level waste
12 ("LLW"), mixed low-level waste ("MLLW"), transuranic waste ("TRU") and
13 high-level waste at Hanford and the dozens of other sites within the DOE complex
14 across the United States. PEIS Vol. I at 1-1. The PEIS examined various
15 strategies for the management of these wastes to determine where and how the
16 wastes would be treated, stored and disposed of. *Id.* at 1-3.

17 37. With regard to TRU, since 1981, DOE has planned to dispose of
18 transuranic waste by placing it in the WIPP. 63 Fed. Reg. 3624 (Jan. 23, 1998).
19 The PEIS examined where to store transuranic waste prior to its disposal at WIPP,
20 and, to the extent processing of the waste would be necessary prior to its disposal
21 at WIPP, the PEIS examined where such processing would occur. PEIS at 1-50.

22 38. In 1998, DOE issued a Record of Decision ("ROD") in which DOE
23 decided that each of DOE's sites (with one exception), including Hanford, would
24 treat and store its own transuranic waste on-site prior to shipment of such waste to
25 WIPP for final disposal. In issuing this decision, however, DOE noted that in the

1 future, it might decide to ship "from sites where is may be impractical to prepare
2 them for disposal to sites where DOE has or will have the necessary capability.
3 The sites that could receive such wastes [include] . . . the Hanford site." *Id.* at
4 3632.

5 39. In 2002, DOE issued a revised ROD concerning its decision to
6 transfer transuranic waste from the Battelle Columbus Laboratory in Columbus,
7 Ohio ("Battelle") and the Energy Technology Engineering Center in California
8 ("ETEC"), for packaging and certification, and interim storage at Hanford with
9 ultimate disposal at WIPP.

10 40. In the case of LLW and MLLW, the PEIS included a preferred
11 alternative that each site would prepare and store its own wastes, and that regional
12 disposal sites would be selected and used to dispose of the LLW and MLLW
13 inventories. The selection of those sites was based on criteria which included the
14 physical characteristics of the sites, including climate, the potential impacts of
15 disposal, the inventory of onsite wastes at the sites and the planned and existing
16 facilities to provide these functions.

17 41. In 2000, DOE announced the selection of the Nevada
18 Test Site ("NTS") and Hanford as the regional disposal sites for LLW and MLLW
19 disposal. PEIS ROD titled "DOE's Waste Management Program: Treatment and
20 Disposal of LLW and MLLW." In the case of Hanford, further analyses were
21 completed through the development of the Hanford Solid Waste Environmental
22 Impact Statement ("HSW EIS") and its associated records of decision.

23 **State of Washington v. Abraham**

24 42. On March 4, 2003, the State of Washington filed
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1 State of Washington v. Spencer Abraham, et al. (E.D.Wash.), No. CT-03-5018-
2 AAM, which concerns Hanford and is related to the instant action. There, the
3 State alleges violations of the National Environmental Policy Act ("NEPA"), 42
4 U.S.C. § 4321 et seq., and the HWMA, Wash. Rev. Code 70.105. On March 7,
5 2003, the State moved for a preliminary injunction seeking to prevent the
6 completion of shipments of transuranic waste from Battelle and ETEC to Hanford.
7 The Columbia Riverkeeper and other parties also filed a complaint (No. CT-03-
8 5044-AAM) alleging violations of NEPA relating to the same shipments of
9 transuranic waste and moved for a preliminary injunction. Both actions were
10 consolidated in State of Washington v. Abraham. The United States opposed the
11 preliminary injunction motions.

12 43. On May 9, 2003, the Court entered an order granting the preliminary
13 injunction motions based on the NEPA claims. Pursuant to the Order, DOE is
14 enjoined from making any further shipments of off site transuranic waste to
15 Hanford pending final resolution of this litigation. Order at 37.

16 44. On June 23, 2004, DOE issued a ROD that again authorized the
17 shipment of the Battelle transuranic waste to Hanford for storage, packaging and
18 certification with ultimate disposal at WIPP, provided that the court lifted its
19 preliminary injunction.

20 45. Thereafter, the State filed an amended complaint, again alleging
21 violations of NEPA and RCRA. With respect to the NEPA claim, the State
22 reiterated its claim as to the off site shipment of transuranic waste to Hanford for
23 certification and packaging. The amended complaint also alleges that DOE's
24 decisions relating to the off site shipment of LLW and MLLW to Hanford for
25 treatment and disposition does not comply with NEPA.

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1 46. Litigation in State of Washington v. Abraham is continuing.

2 **II. U.S. Navy Facilities**

3 47. The Navy owns and operates a number of federal facilities in
4 Washington State, including the Puget Sound Naval Shipyard and Intermediate
5 Maintenance Facility ("PSNS & IMF"), Naval Station Everett, in Everett,
6 Washington, and Naval Base Kitsap, Bangor, near Silverdale, Washington.

7 48. PSNS & IMF performs maintenance, repair, decommissioning
8 and recycling on Navy nuclear powered vessels in the State of Washington at
9 Bremerton, Bangor, and Everett. Some of the work conducted generates
10 radioactive waste and some of the work generates mixed waste. Work that may
11 generate radioactive waste includes routine maintenance, as well as refueling
12 submarines or decommissioning and recycling of old vessels. LLW generated as a
13 result of this work includes removed pumps, reactor vessel heads, and the reactor
14 core barrels.

15 49. Since the 1990's these parts have been shipped from PSNS & IMF
16 to Hanford for disposal as classified low-level radioactive components. Similar
17 operations occur at the Pearl Harbor Naval Shipyard and Intermediate
18 Maintenance Facility and the components generated there are also shipped to
19 Hanford. Because of the classified nature of these components, they must be
20 disposed of at a government facility. Additionally, maintenance activities at PSNS
21 & IMF generate unclassified LLW that is disposed of at the US Ecology operated
22 site at Hanford. This unclassified LLW typically includes contaminated rags,
23 plastic bags, paper, filters, ion exchange resin and scrap materials.

24 50. Mixed waste is received at the PSNS & IMF's Mixed Waste Storage
25 Facility from active ships, or from shipyard production work at any of the three

1 sites in Washington or from certain other Navy generators. Mixed waste is
2 generated from the removal and installation of components on ships, on-ship and
3 off-ship repair of components, decommissioning and recycling (demolition) of
4 ships, shipyard waste management and processing, laboratory analysis and facility
5 demolition. Examples of mixed waste generated include radioactively
6 contaminated paint chips, shielding lead, and potassium chromate solution. Mixed
7 waste managed at PSNS & IMF is treated or is sent for treatment to remove any
8 RCRA hazardous or Washington State dangerous waste characteristic or
9 component, and then disposed of as LLW waste at the US Ecology operated site at
10 Hanford or disposed of as mixed waste at a commercial facility such as Envirocare
11 in Utah.

12 **I-297.**

13 51. I-297 was adopted by Washington State initiative voters on
14 November 2, 2004, and takes effect on December 2, 2004. The Initiative declares
15 that its purpose is to prevent facilities within Washington State "at which mixed
16 radioactive and hazardous wastes have contaminated or threaten to contaminate
17 the environment, such as the Hanford Nuclear Reservation, from adding more
18 waste that is not generated from the cleanup of the site until such waste on-site has
19 been cleaned up and is stored, treated, or disposed of in compliance with all state
20 and federal environment laws." I-297 § 1. The Initiative also contains numerous
21 provisions that would impose new requirements on the storage, treatment and
22 disposal of mixed waste already at Hanford.

23 52. I-297 creates a detailed statutory regime that applies to facilities and
24 sites such as Hanford where "mixed wastes" are managed. E.g., id. § 4. The
25 Initiative defines "mixed waste" so as to attempt to give Ecology jurisdiction over

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1 any "hazardous substance or dangerous or extremely hazardous waste that
2 contains both a nonradioactive hazardous component and a radioactive component
3" Id. § 3(9). "Hazardous substance," in turn, is defined to have the same
4 meaning it has under existing state law, id. § 3(6), which encompasses all
5 "hazardous substances" as defined by CERCLA. RCW 70.105D.020(7).
6 "Hazardous substances" under CERCLA include radioactive materials covered by
7 the Atomic Energy Act. See 40 C.F.R. §§ 61.01, 302.4. Accordingly, I-297
8 purports to vest Ecology with jurisdiction over "hazardous substances" that
9 include AEA materials. Furthermore, the definition of "hazardous substance"
10 under state law and CERCLA is not limited to "wastes" or discarded materials; it
11 can include useful products. See 42 U.S.C. § 9601(14).

12 **I-297 Provisions Concerning Transfer of Waste:**

13 53. A central purpose of I-297 is to prevent the importation of nuclear
14 waste to Hanford from other DOE facilities outside of Washington.

15 54. The Initiative contains an extensive "Declaration of Policy" section
16 that refers to Hanford as "the most contaminated area in North America," states
17 that "use of Hanford as a national waste dump for radioactive and/or hazardous or
18 toxic wastes will increase contamination and risks," and further states that
19 pollution from Hanford has jeopardized Washington residents' right to "a healthy
20 environment." Id. § 2(1), (3). See I-297 § 2(1) ("Use of Hanford as a national
21 waste dump for radioactive . . . wastes will increase contamination and risks.").

22 55. In their public statements, the proponents of I-297 repeatedly
23 emphasized that the Initiative would prevent DOE from bringing nuclear waste to
24 Washington State. For example, the "Yes on I-297" Fact Sheet noted that "[t]he
25 federal government plans to ship 23,775 truckloads of additional radioactive waste

1 to our state" from "other federal nuclear weapons sites across the country." Yes
2 On I-297 Fact Sheet. The Chairman of the "Yes On I-297" campaign also
3 explained that "Washington's voters can protect our state . . . from being a
4 National Radioactive Waste Dump" by voting for I-297. "Yes On I-297" Press
5 Release (June 23, 2004).

6 56. Subject to a few exemptions, I-297 is intended to bar facilities "such
7 as the Hanford Nuclear Reservation," I-297 § 1, from receiving "mixed waste"
8 from other facilities (within or outside of the State) "until such waste on-site has
9 been cleaned up and is stored, treated, or disposed of in compliance with all state
10 and federal environment laws." Id.

11 57. Section 4 of I-297 would require Hanford to obtain a "final
12 facility permit" under RCRA and state law, and to meet all closure and corrective
13 action requirements, before the facility may accept "any additional mixed waste
14 not generated at the facility." I-297 § 4(2).

15 58. Because the cleanup being conducted at Hanford pursuant to the
16 HFFACO entered into by the State, EPA and DOE, is not expected to be
17 concluded for years, I-297 would bar the transfer to Hanford of radioactive waste
18 for the foreseeable future.

19 **I-297 Provisions Concerning Waste On Site At Hanford**

20 59. Provisions of I-297 concerning "mixed waste" on site at Hanford
21 include, but are not limited to the following:

22 60. I-297 defines "mixed waste" as "any hazardous substance or
23 dangerous or extremely hazardous waste that contains both a nonradioactive
24 hazardous component and a radioactive component" Id. at §3(9).

25 Accordingly, I-297 purports to grant the Department of Ecology jurisdiction not

1 only over "waste," but also over "hazardous substances" that include AEA
2 materials. These hazardous substances are not considered mixed wastes under
3 existing definitions even when discarded, and thus have not been subject to the
4 requirements of HWMA.

5 61. I-297 requires that, for facilities, such as Hanford, that have been
6 granted a site-wide permit under the State's HWMA laws, "final facility permits
7 must be applied for and obtained, for each unit or facility within the site where
8 mixed wastes are, or will be, stored or disposed, prior to transporting to, storing or
9 disposing at, the facility any additional mixed wastes not generated at the facility."
10 §4(2).

11 62. I-297 Section 5 requires Ecology "to consider releases, or potential
12 releases, of radioactive substances or radionuclides as hazardous substances," and
13 to require any cleanup of such substances to meet the same health risk based
14 standards that apply to non-radioactive substances that pose similar risks. Id. §
15 5(1). In addition, Section 5 requires Ecology to include radionuclides and
16 radioactive substances when calculating the applicable cleanup standards or
17 allowable releases from any "mixed waste" sites, making any permitting decisions
18 with respect to such sites, or when reviewing "any environmental document"
19 prepared by another governmental agency with respect to such site. Id. § 5(2).

20 63. I-297 Section 6 establishes new requirements for waste trenches and
21 tanks. It requires Ecology to issue, within 60 days, an order requiring any site
22 containing unlined soil trenches where mixed wastes are "reasonably believed by
23 [Ecology] to have been disposed" to (a) cease disposal of all further wastes in
24 unlined trenches; (b) investigate and provide an "inventory based on actual
25 characterization of all hazardous substances" in the trenches; (c) investigate

1 releases of such substances; (d) prepare a plan for waste retrieval, treatment,
2 closure, and monitoring; and (e) install and maintain a ground water and soil
3 column monitoring system within two years. Id. § 6(1). Such facilities are
4 precluded from expanding their land disposal units if all wastes have not been
5 "fully characterized," a release has occurred, or Ecology believes that there is a
6 significant potential for a release of hazardous substances. Id. § 6(2).

7 64. With regard to "mixed waste" tank systems, the Initiative prevents
8 any action to close individual tanks, or any action that "may prevent the retrieval
9 of residual mixed wastes" or releases into the soil, until the quantity, nature, and
10 potential impacts of such residuals or releases has been determined. Id. § 6(3). In
11 addition, Ecology may not allow the landfill closure of any tank system "prior to
12 all potentially effective and practicable actions having been taken to characterize,
13 and remediate, releases and potential releases." Id.

14 **Enforcement of I-297**

15 65. The requirements of I-297 may be enforced by the State or through
16 citizens suits. Id. § 10(1). Violations of I-297 are considered to be violations of
17 RCW 70.105 and are subject to civil and criminal penalties. Id. § 10(4). To the
18 extent that there is a conflict between I-297 and other existing state laws, "the
19 provisions of [I-297] shall govern." Id. § 11.

20 **Harm Posed By I-297 to DOE Plans for Transfer of Waste to Hanford**

21 66. If put into effect, I-297's prohibition on the transfer of "mixed waste"
22 to Hanford would jeopardize DOE's national program for dealing with wastes
23 stored in DOE complex facilities.

24 67. I-297 would bar DOE from carrying out its plan to transfer MLLW to
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1 Hanford. The serious consequences of DOE's inability to dispose of such wastes
2 at Hanford would be manifested throughout the DOE complex. For example,

3 68. Due to the plans to clean up and remove all facilities for treatment
4 and storage of radioactive waste at Rocky Flats, DOE will be unable to return
5 these wastes to Rocky Flats after February 2005. If Hanford remains unavailable,
6 DOE has no alternative site for these waste streams.

7 **Harm Posed By I-297 to DOE's On-Site Cleanup Operations**
8 **At Hanford**

9 69. The potential impacts of I-297 on DOE's cleanup operations at
10 Hanford are far-reaching and its ultimate impact is still unknown because of
11 numerous ambiguities in the Initiative's provisions. The following are examples
12 of harm that the Initiative could cause to DOE's cleanup operations at Hanford.

13 70. I-297's definition of "mixed waste" (§3(9)) would subject virtually all
14 of the Hanford waste stream, and even some chemical substances used at Hanford
15 and PNNL which are not even wastes, to HWMA designation, storage, treatment
16 and disposal requirements.

17 71. Many facilities currently managing LLW and TRU are not permitted
18 for mixed waste and do not have storage areas established. Were I-297 to be
19 implemented with this definition, numerous operations would be out of
20 compliance. Due to the large number of new permits that I-297 would require, it
21 may be months or years before DOE could resume these critical operations.

22 72. Even the facilities at Hanford that are presently permitted under the
23 HWMA will be out of compliance with I-297 if it becomes effective because some
24 of the waste materials handled at those facilities are not considered mixed waste
25 under existing definitions, but would be mixed waste under the I-297 definition.

1 73. Under the expansive definition of "mixed wastes" in I-297, *non-waste*
2 radioactive chemicals would become regulated as mixed waste. Under these
3 restrictions, a large number of biotechnology, environmental management, and
4 national security projects at PNNL would not be permitted to use radioactive
5 materials.

6 74. To the extent those existing statutory exemptions are overridden by I-
7 297, the impact would further expand the universe of materials subject to the
8 HWMA requirements as discussed above. DOE would need to obtain new state
9 permits for many activities that both Washington State and EPA have exempted
10 from permitting requirements due to their low potential to affect human health or
11 the environment. Obtaining new permits for these activities would delay and
12 disrupt cleanup, and many scientific research and development activities.

13 75. Section 4(2) of I-297 can be interpreted to prohibit transfer of waste
14 between units or facilities on the Hanford Site until every unit or facility obtains a
15 final facility permit. If the State adopts such an interpretation, much of Hanford's
16 day-to-day operations and cleanup activities could not continue.

17 76. Sec. 6(1) of I-297 requires DOE to perform "actual characterization"
18 of buried waste disposed in unlined trenches, which could require workers to open
19 thousands of containers of waste for sampling and/or visual examination,
20 potentially jeopardizing worker safety.

21 77. **The potential impacts of I-297 on the Navy's programs** are far-
22 reaching and its ultimate impact is still unknown because of numerous ambiguities
23 in the Initiative's provisions. The following are examples of harm that the
24 Initiative could cause to the Navy.

25 78. If put into effect, I-297 would jeopardize the Navy's transfers of
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1 radioactive waste to Hanford.

2 79. I-297 provides that "nothing in the act shall affect existing permits
3 for, or in any manner prohibit, the storage or disposal of sealed nuclear reactor
4 vessels or compartment from retired United States Navy submarines or surface
5 ships at the existing disposal facility at Hanford, or affect existing permits of the
6 operation of any facility by the federal government at which United States Navy
7 reactors are decommissioned or refueled." Id., §8(2). I-297's exemption does not,
8 however, extend to other classified radioactive materials that until now the Navy
9 has sent to Hanford.

10 80. Because I-297's definition of "mixed waste" (§3(9)) extends not only
11 to waste but also to hazardous *substances*, the Initiative could bar the Navy from
12 shipping to Hanford virtually all radioactive waste that is not expressly exempted
13 by I-297. Sections 4 and 6 of I-297, which prohibit Hanford from accepting waste
14 until remediation is complete, could also restrict Navy shipments. This includes
15 pumps, reactor vessel heads, and reactor core barrels which until now have been
16 shipped to Hanford from PSNS & IMF and from the Pearl Harbor Naval Shipyard
17 and Intermediate Maintenance Facility.

18 81. Additionally, maintenance activities at PSNS & IMF generate
19 unclassified low-level radioactive waste that is disposed of at the U.S. Ecology
20 operated site at Hanford. These unclassified low-level radioactive wastes could
21 also be considered "mixed waste" under I-297 and subject to the Initiative's
22 moratorium on the shipment of mixed waste.

23 82. I-297 would also harm the Navy's operation of its Washington State
24 facilities. The PSNS & IMF mixed waste storage facility is operating under
25 RCRA "interim status." If PSNS & IMF were prohibited under Section 4(2) of I-

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27 COMPLAINT

- 24 -

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1 297 from accepting mixed waste at the Bremerton storage facility from off-site
2 facilities, ship maintenance that generates mixed waste at the Everett or Bangor
3 sites would have to be halted.

4 **COUNT ONE**

5 83. Paragraphs 1-82 are incorporated by reference herein.

6 84. I-297 is contrary to the AEA, 42 U.S.C. § 2201(i)(3), and the
7 Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2,
8 because it seeks solely to regulate source, special nuclear, and byproduct
9 materials, which are excluded from the definition of "solid waste" under RCRA,
10 42 U.S.C. § 6903(27).

11 **COUNT TWO**

12 85. Paragraphs 1-84 are incorporated herein by reference.

13 86. I-297 is not in accordance with law because the United States has not
14 waived sovereign immunity for state requirements, such as this one, that do not
15 specifically relate to the control of hazardous or solid waste. 42 U.S.C. § 6961.

16 **COUNT THREE**

17 87. Paragraphs 1-86 are incorporated herein by reference.

18 88. The Commerce Clause of the United States Constitution gives the
19 Congress the power to regulate commerce among the states, and denies the States
20 the power unjustifiably to discriminate against or burden the interstate flow of
21 articles of commerce.


22 89. I-297 is contrary to the Commerce Clause because it unlawfully
23 discriminates against the importation to Hanford and other federal facilities of out-
24 of-state waste from other DOE and Navy facilities.

25 **PRAYER FOR RELIEF**

1 WHEREFORE, the United States of America prays that this Court order the
2 following relief:

- 3 (1) declare that I-297 is invalid in its entirety;
4 (1) declare that I-297 is outside the statutory authority or jurisdiction of
5 Ecology conferred by law;
6 (2) enjoin Defendants, preliminarily and permanently, from taking any
7 action based upon I-297; and
8 (3) grant such other relief as may be just and proper.

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24 Dated: December 1, 2004

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